



POLICE DEPARTMENT

April 14, 2008

MEMORANDUM FOR: Police Commissioner

Re: Sergeant James Felice  
Tax Registry No. 910262  
Medical Division  
Disciplinary Case No. 82423/06  
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The above-named member of the Department appeared before me on January 17, 2008, charged with the following:

1. Said Sergeant James Felice, assigned to the Medical Division, on or about June 10, 2005, at a location known to this Department, in [REDACTED], engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Sergeant, while monitoring a member of the service, did improperly accept gifts from said member of service.

PG 203-10 Page 1, Paragraph 5 – GENERAL REGULATIONS – PROHIBITED CONDUCT

2. Said Sergeant James Felice, as assigned in Specification #1, on or about and between July 2005 through September 2005, at a location known to this Department, in [REDACTED], did wrongfully discuss official Department business with Police Officer Richard Averso without authorization or permission to do so. (As amended)

PG 203-10 Page 1, Paragraph 3 – GENERAL REGULATIONS – PROHIBITED CONDUCT

3. Said Sergeant James Felice, as assigned in Specification #1, on or about and between June-July 2005, upon observing, having become aware of, or upon receiving an allegation of corruption or serious misconduct involving a member of service, did fail and neglect to notify his Commanding Officer and or the Internal Affairs Bureau active desk, as required.

PG 207-21 Pages 1 and 2 – ALLEGATIONS OF CORRUPTION AND SERIOUS MISCONDUCT AGAINST MEMBER OF THE SERVICE

4. Said Sergeant James Felice, as assigned in Specification #1, on or about February 21, 2006 at a location known to this Department, in New York County, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Sergeant did deny exchanging phone numbers with a member of the service that he was monitoring. (As amended)

PG 203-10 Page 1, Paragraph 5 – GENERAL REGULATIONS – PROHIBITED  
CONDUCT

The Department was represented by Beth Douglas, Esq., Department Advocate's Office, and the Respondent was represented by Bruno Gioffre, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Not Guilty of Specifications 1 and 2, and Guilty of Specifications 3 and 4.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Lieutenant Cecil Wade, Lieutenant Dominick Valenti, and Sergeant Margaret Roach as witnesses.

Lieutenant Cecil Wade

Wade, the Integrity Control Officer in the Personnel Bureau, Staff Services Section, was assigned to investigate the Respondent. He inherited the case from Lieutenant McGrath, and reviewed documents previously in the file. Wade explained

that part of the Respondent's job was to conduct supervisory visits on persons that were on Sick Report, ensuring that they were home or otherwise "they are supposed to be."

INTERVIEW OF SUZANNE AVERSO<sup>1</sup>

Wade testified that he interviewed Suzanne Averso. He also reviewed her prior interview.

Suzanne Averso stated that she met the Respondent when he was conducting supervisory visits on her husband, Police Officer Richard Averso.<sup>2</sup> Ms. Averso stated that she and the Respondent learned that they grew up in neighboring towns and knew an individual in common, Frank Mitchell. Wade stated that Mitchell was a childhood friend of the Respondent.

During further visits, Wade related, the Respondent and the Aversos became much friendlier, and the Respondent gave the Aversos a business card with his home and personal cell phone numbers written on the back. Ms. Averso gave Wade a photocopy of the business card (see Department's Exhibit [DX] 7), and sent him her personal cell phone records and her husband's phone records.

Suzanne Averso also said that the Respondent told the Aversos about an accident his wife had with his red Jeep. Ms. Averso stated that Richard Averso made arrangements for a friend who worked at a collision shop to repair the Jeep. Averso purchased parts for the repair from two establishments, Crash & Rust, and Accuparts. The parts were purchased on the Aversos' business account, S&R Auto Sales. Ms. Averso said that once the parts were received, the Respondent took the Jeep to the

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<sup>1</sup> The Advocate stated that Suzanne Averso's hearsay account was being introduced not for the truth of the facts asserted in it, but to establish the basis of Wade's investigation. The Advocate made a similar representation as to the hearsay account of Richard Averso, see infra.

<sup>2</sup> In this decision, Richard Averso will be referred to as "Averso," and Suzanne Averso as "Ms. Averso."

Aversos' home, and Richard Averso had it towed to [REDACTED] Collision. The car was repaired, returned to the Aversos, and picked up by the Respondent. Ms. Averso stated that the Respondent was not charged for the repairs, but was so grateful that he gave the Aversos a \$200 gift certificate to a store called Pizza Carnival.

Wade testified that he contacted Pizza Carnival, but the store told him that they could only trace a gift certificate if it still had a balance, and they had no \$200 certificates with remaining balances.

Suzanne Averso gave Wade two receipts from Crash & Rust dated June 9 and 10, 2005 (DX-5a & 5b, respectively). She also had Accuparts forward receipts to Wade. Ms. Averso told Wade that she had Mitchell, with whom she had some kind of business relationship, arrested in July or August 2005. She claimed that the Respondent called the Aversos several times on their personal cell phones and tried to get Ms. Averso to drop the charges, but she refused.

Ms. Averso also said that she found out about posts being made from a person with the e-mail address [REDACTED] to a discussion forum on a website called The Schwartz Report. The posts were on a section about [REDACTED] High School [REDACTED], and alleged that her husband was committing "disability fraud." Another Schwartz Report poster, "Profiler," advised readers that had information concerning Averso's commission of disability fraud to contact Sergeant Margaret Roach at [REDACTED]

Wade explained that Roach was assigned to the Absence Control and Investigations Unit (ACIU), and she was in fact investigating Richard Averso. Wade determined that [REDACTED] had made a complaint to Roach via e-mail, indicating that

Averso was buying and selling cars while out sick. The complainant made the original complaint to IAB on July 5, 2005. The complaint was referred to ACIU on August 4, 2005.

██████████ wanted to remain anonymous. He wrote to Roach on August 14, 2005, and said that he felt Averso "already knows, or at least he suspects that . . . something is wrong because he was giving him a mental list of suspects as to who he felt made this complaint against him."

Wade believed the Respondent began a two-week vacation starting on July 27, 2005, and when he returned, he was working at the ██████████ clinic. Roach told Wade that she did not "specifically discuss" the ██████████ matter with the Respondent, "but he may have been around while the case was being discussed." The Aversos did not tell Wade they knew anyone else in ACIU besides the Respondent.

Suzanne Averso stated that she believed that the Respondent had given Mitchell information. On December 19, 2005, Ms. Averso said that when she confronted the Respondent, he denied giving Mitchell information. The Respondent told Ms. Averso that it was a neighbor of the Aversos that made an anonymous complaint to the Internal Affairs Bureau, and he was probably the source of the Internet posts. This neighbor alleged that Averso was working on cars in his driveway.

Wade also conducted an Official Department Interview of a Captain Hogan, who had worked with Averso and was friendly with the couple. Wade believed Hogan worked in the Quartermaster Section, and Wade believed this command was located in Queens. Hogan told Wade that he bought certain vehicles from the Aversos. Hogan also admitted to Wade that after Roach spoke to Hogan in an attempt to get information about

the Aversos, he called them right afterward and revealed, "Somebody came to ask questions about cars that you sold me."

Wade testified that Ms. Averso had been indicted on several charges, including tampering with Mitchell's computer "and things like that."

#### INTERVIEW OF RICHARD AVERSO

Wade also interviewed Richard Averso. Averso stated that he met the Respondent during supervisory sick visits. Initially, the visits lasted about one to three minutes, but Averso and the Respondent "started talking" once they found they had many things in common, including fishing, hunting and repairing cars. They became friendly, and the visits got longer "because they were shooting the breeze." Averso told Wade that the Respondent "offered him" a business card with his home and personal cell phone numbers. Averso gave the Respondent his personal cell number, but was unsure whether his wife gave the Respondent her personal cell number.

During one visit, Averso told Wade, the Respondent said that his wife had been in a car accident and indicated there had been damage to the front grille and parts on the front right side, including the headlight. The estimates that the Respondent was getting were a little too high, and Averso suggested that a friend of his, who was "in the business," could do the repairs.

Averso told Wade that he called Crash & Rust and ordered some of the parts. The Respondent picked up those parts. Averso ordered them on S&R Auto Sales, his business. He also called Accuparts, also referred to as Fit-Rite, under the S&R account and ordered other required parts. Once the parts were received, the Jeep was towed to

████ Collision, where it was repaired, and then returned to the Averso residence. The Respondent picked up the vehicle and drove it off.

Averso asserted in his interview that the Respondent told him around the end of July 2005, while the Respondent was still making supervisory visits, that an anonymous tip was made to IAB, and funneled to the Medical Division, that Averso was buying and selling cars while on Sick Report.

Averso stated in the interview that he was aware of the Schwartz Report postings. Averso also related that he did not believe the IAB complaint was from "an anonymous neighbor," as the Respondent insisted, but was actually from Frank Mitchell in retaliation for Suzanne Averso having him arrested. Averso believed that the Respondent gave Mitchell the information posted on the website.

#### STIPULATION

A report prepared by Wade on December 7, 2006, concerning his contacts with █████ Collision was stipulated into evidence as Court Exhibit (CX) 6. Wade was informed by Tom Sweeney of █████ Collision that "he did take in a [J]eep from Richard Averso in 2005." Sweeney could not, however, recall what work was performed on the Jeep "or any specific information" about the car.

#### FIRST OFFICIAL DEPARTMENT INTERVIEW OF RESPONDENT

Wade reviewed the first Official Department Interview of the Respondent conducted on February 21, 2006 (CX-1). The Respondent said in the first interview that he had no contact with the Aversos other than as a supervisor in ACIU. He said he did not know either Richard or Suzanne Averso's personal cell phone numbers, never called either one, and never exchanged phone numbers with them. The Respondent also said

that in the first interview that Ms. Averso called his home to make dinner arrangements with his wife, but denied knowing how Ms. Averso got his number.

The Respondent stated at the first interview that his wife had an accident with the Jeep about a year prior, and damaged the front bumper. The Respondent said that the only portion he did not repair himself was a scratch on the bumper, which his wife had replaced at a body shop.

At the first interview, Wade testified, the Respondent stated that Ms. Averso had called his home posing as a co-worker and tried to arrange dinner plans for the Aversos and the Felices. This "was a little bit scary for" the Respondent, and he was angry with his wife over it.

Wade testified that the Respondent stated in the first interview that he became aware of Roach's investigation when Lieutenant Valenti asked him whether he observed Averso fixing or repairing automobiles in his driveway.

#### WADE'S REVIEW OF PHONE RECORDS

Wade testified that he subpoenaed the telephone records of the Respondent's home phone, his personal cell phone, and the cell phones of Richard and Suzanne Averso (see DX-1, Resp't's home landline phone records of; DX-2, Resp't's personal cell phone records; DX-3, Aversos' cell phone records; DX-4, Resp't's Dep't cell phone records).

Wade testified that several telephone calls were made between the Respondent and Richard and Suzanne Averso, both during and after the period of April 26, 2005, to July 27, 2005. This was the period when, Wade believed, the Respondent was making supervisory visits to Richard Averso.



In particular, Wade asserted, two calls were made from the Respondent's Department cell phone to the Aversos' home on a day, May 13, 2005, that the Respondent's supervisory weekly record indicated he was on vacation. Additionally, calls were made between Suzanne Averso's cell phone and the Respondent's personal cell phone, including one where the Respondent called her. There were also calls between the Respondent's cell phone and Richard Averso. Wade stated that there were no phone calls between the Respondent's home phone line and either Richard or Suzanne Averso's cell phone, or between the Respondent's home phone and the Aversos' home phone.

Wade also stated that on June 9, 2005, at 2:39 p.m., a call was made from the Respondent's personal cell phone to Crash & Rust, the auto parts retailer. Wade asserted that Crash & Rust only dealt with business customers. Wade testified that he spoke to a Crash & Rust salesman named John, and gave him the information number listed on the receipts given to him by Suzanne Averso.

Wade discovered from John that the June 9, 2005, receipt was generated at 2:53 p.m., and parts were sold to [REDACTED] Auto Sales, an entity whose address was the same as the Aversos' home address [REDACTED]. The part purchased was a black grille for a Cherokee Wagoneer, model years 1991 to 1996. Wade stated that a grille was one of the parts the Respondent indicated was necessary for the repairs to his wife's Jeep.

The June 10, 2005, receipt was also for [REDACTED] Auto Sales, and referenced a painted right-side head lamp for a Cherokee Wagoneer, years 1991 to 1996. Wade asserted that "those parts match the parts that Sergeant Felice previously testified to."

Wade also obtained two June 3, 2005, receipts for Accuparts / Fit-Rite; that establishment faxed the documents to him (DX-6). The billing was to [REDACTED] Auto Sales. The parts purchased were a rubber piece for the front bumper, and a right-side corner lamp. The second of the Accuparts receipts indicated that the parts would fit a Cherokee Wagoneer, model years 1984 through 1996.

On cross-examination, Wade agreed that he "assumed that it was either for a Cherokee or a Wagoneer." Wade believed the type of Jeep owned by the Respondent was an "XJ."

#### SECOND OFFICIAL DEPARTMENT INTERVIEW OF RESPONDENT

Wade conducted the second Official Department Interview of the Respondent on October 12, 2006 (CX-2). The Respondent stated that he did not know Suzanne Averso's cell phone number and had never called her, although she called him. He said he did not usually exchange numbers with Department members that he visits, but they can get his number from Caller ID.

Wade testified that the Respondent maintained he "did not personally give these numbers out to the Aversos." Wade admitted, however, that he asked the Respondent if he ever gave the Aversos his home or private cell phone numbers, and the Respondent answered that he "possibly did."

Wade then confronted the Respondent with the business card (DX-7). The Respondent confirmed it was his handwriting on the card, and "said, 'Oh, yes,' he did give the Aversos that card," possibly in April or May of 2005, when Averso said he had some kind of family emergency, possibly a sick child.

Wade disagreed that such emergency would be a reason for an investigator like the Respondent to give out his cell phone number. He asserted that it would “[n]ot specifically” strike him as “important that if Mr. Averso, did have a medical condition with . . . one of his children . . . and he was going to have to leave the residence, to be able to get in touch with the person who is coming by to check on him.” Wade stated someone in that circumstance was supposed to call the Medical Division or the Sick Desk. Wade claimed that there was no reason for the Respondent to give out his personal number.

The Respondent told Wade in the second interview that he gave his private cell phone number to Department members so they can call him if they could not get through to the Sick Desk. The Respondent added that he gave out his home number also, although he conceded that members should not be calling him at home.

Wade testified that the Respondent said that the calls made to Richard Averso’s cell phone were probably related to the supervisory visits. Wade asserted, however, “now he was telling me that he remembered” getting a telephone call from Richard Averso in August 2005, attempting to set up a meeting with Frank Mitchell. The Respondent said that he refused because there was an order of protection involved. The Respondent also claimed that on September 11, 2005, Averso called him and asked if he was under investigation. The Respondent asserted that he remembered these calls once Wade showed him the business card. The Respondent did not recall what the other calls were about, except that he mentioned that the Aversos would occasionally call before the Respondent arrived and ask if he wanted breakfast.

Wade testified that the Respondent initially stated that he never heard of Crash & Rust and never had any dealings with them. After Wade asked him about the June 9, 2005, phone call to Crash & Rust, the Respondent admitted that he might have called them to check on parts for the car. The Respondent claimed to be unaware, however, if Averso ordered parts for him, and maintained that he did not ask Averso to order any parts for him, even after Wade presented him with receipts. The Respondent admitted that the parts shown on the receipts were the parts damaged on his Jeep and necessary to repair it.

The Respondent claimed not to recall the nature of the two calls made between his Department cell phone and the Aversos' home phone on May 13, 2005, a date the Respondent was on vacation.

The Respondent maintained in the second interview that he did the repairs on the Jeep when it was warm outside, possibly in April or May. The Respondent placed the parts onto the Jeep, including the grille, headlight, and a rubber piece around the headlight. He contended that his wife had the remainder of the work done; this included a scratch to the bumper and possibly some painting.

During the second interview, the Respondent stated that Lieutenant Valenti asked him if he observed Averso repairing cars in his yard. The Respondent replied that he had not, but that he believed Averso was buying and selling cars. The Respondent believed he was told by the Aversos that Suzanne Averso purchased cars over the Internet.

The Respondent denied informing the Aversos that there was an anonymous complaint regarding Averso committing disability fraud. The Respondent stated that he could have inadvertently mentioned it around them, but did not think he did.

Wade asked the Respondent if he could provide receipts for the parts he said he purchased for his wife's Jeep, and the Respondent answered that he believed he had those documents.

After the second interview, Wade received a telephone call from Sergeant Perugia, a trustee in the Sergeants Benevolent Association. Perugia said that he was given some receipts by the Respondent in relation to the vehicle repairs (see DX-8, [REDACTED] Chrysler Jeep receipts).

Wade called the dealership listed on the receipts, and spoke to the manager, Robert Kennedy. Kennedy said that the receipts were for a complete 1996 Jeep Cherokee bumper assembly, and were "special ordered" by a person with the last name of Zoob. The receipts were dated November 11 and 15, 2005, and did not match the parts the Respondent said he used to repair his Jeep.

#### THIRD OFFICIAL DEPARTMENT INTERVIEW OF RESPONDENT

Wade conducted a third interview of the Respondent on December 8, 2006. The Respondent asserted in the interview that he told Valenti, before the lieutenant made an inquiry to him, that he thought Averso was buying and selling cars.

Wade testified that he explained to the Respondent that he had called [REDACTED] Chrysler Jeep, and the dealership said the parts were ordered by someone named Zoob. Wade also "indicated what the parts were for." The Respondent answered, "well, he went to them and he tried to have them find receipts, but they couldn't find the receipts so he told them the type of parts that he purchased and these were the only parts that they gave him, so that's what he presented to me."

The Respondent also said in the third interview that he had spoken to his wife about where the Jeep was fixed. His wife told him that she arranged with Ms. Averso to have it repaired.

Wade obtained the cell phone number of the Respondent's wife, Sheila Felice, during the third interview. Wade compared her cell phone records to those of the Aversos. He determined that there were no calls between the Aversos' cell phones and Ms. Felice's cell phone.

Lieutenant Dominick Valenti

Valenti was the Commanding Officer of ACIU. He oversaw supervisors that monitored members of the Department that were Chronic Sick "B." The supervisors also conducted investigations on members suspected of violating Department sick procedures.

Valenti testified that Averso had been designated Chronic Sick "B" after [REDACTED] y. The Respondent, who worked in ACIU, was assigned in the end of April 2005 to conduct supervisory visits on Averso. The supervision ended in late June or early July 2005. Afterwards, Valenti believed, the Respondent was temporarily assigned to the Long Island City clinic.

Valenti testified that other supervisors might have been assigned to visit Averso if the Respondent had the day off. No other supervisors reported misconduct on the part of Averso.

In August 2005, after IAB referred a case to ACIU involving an investigation of Averso, Valenti asked the Respondent what he noticed when he visited the Averso home.

Valenti believed the conversation was over the telephone because the Respondent was assigned to the Long Island City clinic at the time.

The Respondent told Valenti that he had observed "a couple" of cars there, but had not seen Averso working on them, and did not "know if there was actually work being done on the cars."

Valenti knew this conversation could not have occurred while the Respondent was still monitoring Averso "because we would have had a misconduct investigation going if that was the case." Valenti asserted that in ACIU, working while on Sick Report was probably the most serious infraction they examined. Valenti added that none of the Respondent's supervisor travel sheets indicated that he suspected "some sort of conduct by Officer Averso about selling and fixing cars."

Valenti stated that "probably a couple of months" after August 2005, the Respondent told Valenti that he believed Averso was getting car parts from a location in Long Island City.

Sergeant Margaret Roach

Roach was assigned to ACIU. Her responsibilities as an investigator there were to investigate Department members on Sick Report that were malingering, or "for any allegation that's made against them, we go out and we investigate it."

Roach stated that ACIU began an investigation against Richard Averso in the beginning of August 2005. The e-mail complaint sent to IAB by [REDACTED] was forwarded to the Personnel Bureau, then to ACIU. Roach received the case on August 4, 2005.

██████████ stated in the complaint that he was a neighbor of Averso, and saw him working on vehicles in his driveway. ██████████ was angry because Averso “was bragging that he was going to get three-quarters.” In August 2005, Roach set up a free ██████████ e-mail account to communicate with ██████████, and asked him for more details. A few days later, the complainant replied and said he wished to remain anonymous and “didn’t really want to get involved,” noting that Averso had spoken to him and “had a list of suspects who gave him up.”

In mid-August, Roach conducted observations at Averso’s residence, using an unmarked rented car. She did not see any misconduct by him. She did observe two or three vehicles in the driveway, but not “[m]ultiple” cars so as to be unusual.

Roach testified that the Respondent called her in late August or early September 2005, and asked how the investigation against Averso was proceeding. Roach answered that she was closing it because she “didn’t see anything going on” at the Averso home. The Respondent stated that he wanted to approach the Department of Motor Vehicles “and look and see because” Averso “is definitely selling cars. The Respondent wanted “to get all the registrations that he fills out the registrations for these vehicles, go through DMV to find out exactly how many cars he has registered under his name.” The Respondent also mentioned an online auction site, either Impact or Odessa. ██████████ had also mentioned the auction site.

As a result of this information, Roach testified, she continued the investigation against Averso, leading to the substantiation of charges against him.<sup>3</sup>

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<sup>3</sup> The Advocate stated at trial that Richard Averso was disciplined for his actions, and retired from the Department on “three-quarters.”



Roach denied divulging the information she received from [REDACTED] in the original e-mail to the Respondent. She related that she did discuss it with other colleagues, including a detective she sent to get information from DMV. Roach stated that anyone that worked in ACIU would have access to the log that contained [REDACTED]'s complaint.

#### The Respondent's Case

The Respondent called Sheila Felice as a witness, and he testified in his own behalf.

#### Sheila Felice

Sheila Felice, a hospice social worker, was the Respondent's wife of fifteen years. They owned a 1995 Jeep Cherokee, a minivan, and one other car. Ms. Felice testified that in January 2005, she got into an accident in the Jeep when she rear-ended somebody.

Ms. Felice testified that Suzanne Averso called her in June or July of 2005, but averred on cross-examination that it was July. She knew she did not speak to Ms. Averso after going on vacation to the Poconos at the end of July or beginning of August. Ms. Averso told Ms. Felice that their husbands worked together in the Medical Division. Ms. Averso "thought it would be nice if we could all get together." Ms. Felice testified that both she and her husband had socialized with workfriends in the past and "always enjoyed that." Ms. Averso was "very friendly and engaging." Both women, Ms. Felice said, liked to talk.

Ms. Felice asserted that she did not tell the Respondent about her conversation with Ms. Averso because they wanted to "try to maybe surprise him" with the get-

together. She did not know why she wanted a surprise, and simply “thought it would be fun.”

Also, Ms. Felice “didn’t want him to know I was going -- she was going to help me get it painted.” The Jeep, however, “didn’t look good on one fender,” cosmetically, and needed to be painted. “It was an aggravation” for the Felices, “because it wasn’t the first accident I had that was kind of stupid . . . so” the Respondent “was a little annoyed with me about those accidents.” The Respondent told his wife that if she wanted to get it fixed, she should “figure it out for myself or just leave it the way it was, because it was okay to drive like that.”

Ms. Felice testified that she and her husband shared responsibility for financial matters within the household.

Ms. Felice testified that Ms. Averso said she was aware of the damage to the Jeep through a conversation with Richard Averso. Ms. Averso “offered to finish getting it fixed for me” by someone Ms. Averso knew in the business. Ms. Averso offered to have someone pick up the car, and Ms. Felice would leave the money and the keys. Ms. Felice testified that she called Ms. Averso in response to a message, perhaps once.

Ms. Felice testified that she left \$150 in cash under the floor mat. She left the keys in the Jeep as well; the vehicle was not towed away. It was picked up, and returned after about one or two days. Ms. Felice had “no idea” who picked up the car, and did not believe she was home when this occurred. She agreed that “a complete stranger, who you have no idea who this person was, would have come and picked up your car and you would have left your keys and cash inside your vehicle” was “exactly what happened.”

Ms. Felice did not know who actually painted the vehicle, and believed the painting occurred in July. The remainder of the accident repairs had been done by the Respondent in their driveway while the weather was nice, before August 2005. It was possible, Ms. Felice stated, that all the repairs could have occurred around the same time.

Ms. Felice said she lived in "a nice neighborhood," and was "not a development," but "more like added onto country houses" on "like a quiet street." She asserted that she and her husband did not lock their doors, and that he did not "lock the cars."

Ms. Felice subsequently learned that Ms. Averso began "making crazy accusations," including sexual harassment, against Mitchell, and had him arrested. She believed she learned about this during the [REDACTED] vacation. Ms. Felice had "[n]ot so good" an impression of Ms. Averso after the Mitchell allegations arose, and did not speak to her after the [REDACTED] trip. One of the reasons for this was that Ms. Felice realized that Ms. Averso was "a very manipulative person," who had lied to and "tried to dupe" her.

When Ms. Felice mentioned to the Respondent that she had spoken to Ms. Averso, he got very angry. She probably told her husband that Ms. Averso said the Respondent and Richard Averso were co-workers. Ms. Felice noted that the Respondent told her, "It was not a coworker relationship, and that we would have never been able to go out to dinner with them."

Ms. Felice did not tell her husband then about the Jeep repairs because "I guess I was worried, you know, that it was going to be a problem." The Respondent "was angry that there were any dinner conversations about going out and whatnot . . . . So I let it go." She told her husband eventually "because he brought it to my attention after" the first of

his Official Department Interviews. Ms. Felice testified that the dinner with the Aversos never happened.

Ms. Felice testified that she and the Respondent had the exact same model cell phone. Ms. Felice asserted that she and her husband mix up their cell phones "a lot." She displayed hers to the Court. It was a light gray or silver LG flip-type phone with Verizon as the carrier.

### The Respondent

The Respondent, a member of the Department for 19 years and 11 months, was assigned to the Medical Division starting in January 2002. His responsibilities as an ACIU field supervisor were to visits individuals who were out sick, including those that were Chronic Sick "B." He indicated that ACIU was located in Lefrak City.

One of the members the Respondent supervised was Richard Averso, beginning in April 2005. The Respondent believed the supervision ended on July 26, 2005.

On average, the Respondent visited Averso about five days a week. The officer, who was sick with a line-of-duty injury, had just had back surgery and "was very, very incapacitated." The Averso home "was a mess. . . . [A] crazy place to visit." The Respondent testified that he built a rapport with Averso, as he tried to do with everyone he visited so that they would trust him when he told them about Department rules and regulations. The Respondent contended his discussions with Averso "on a personal level" were "[m]inor," but he believed they spoke about hunting or fishing, as Averso was "constantly" wearing T-shirts featuring those subjects.

The Respondent testified that in late July, there were approximately three to four vehicles in the Aversos' driveway at any one time. He did not "know if it was then or earlier," but the Respondent had a conversation with Averso "about doing something about cars." The Respondent "suspected something might have been going on," although he never saw Averso working on or selling cars. The Respondent occasionally observed vehicles with dealer plates or without any plates.

Because of his suspicions, the Respondent instructed Averso on the Department policy of working while out sick. Averso "assured me that he wasn't," and "[o]f course early in the visits, I knew he wasn't" because he was so injured. "If anything," Ms. Averso was doing the work but her husband "was staying away from it."

The Respondent stated that he "[n]ever" saw Averso engage in "misconduct." The Respondent asserted, however, that he brought his suspicions to Valenti's attention. This conversation, the Respondent insisted, was before July 27, 2005, because after that, the Respondent was no longer in Valenti's unit in the Medical Division. Subsequently, the Respondent said, Valenti approached him "and asked me later on what was going on again."

The Respondent contended that he told Valenti "under no uncertain terms that there was something going on out there. . . . Whether it was misconduct by" Averso "or his wife was legally selling cars, there was something going on, and that's what I conveyed" to Valenti. The Respondent subsequently testified, however, that he "believe[d]" he gave Valenti "an indication that you suspected something but . . . never observed misconduct."

The Respondent indicated that he gave the individuals he supervised his phone numbers so that, if they were screening calls or had Caller ID, they would know it was him. The Respondent testified that all of the individuals he supervised had "my phone numbers," so during his Official Department Interviews, he was not sure if he had given those numbers out or if it had been revealed by Caller ID. The Respondent did not remember at the time of his first interview whether he specifically wrote down the information for the Aversos. He stated at trial that he "knew very well that every single person that I visited had my phone numbers. I didn't have to give it to them, they always had it."

The Respondent believed that during the second interview, before being shown his business card (DX-7), he was asked if "you ever give your cell phone number out," and he said yes. The Respondent admitted at trial that his handwriting was on the card, and that it listed his private cell phone and home phone numbers.

The Respondent testified that he remembered giving the Aversos his business card because they had mentioned that their child was "very sick and they wanted to rush her up to the hospital and they couldn't get through to the sick desk." He thought he "remembered giving them my number before" seeing the card, but when he saw the card, "he knew he gave it to them."

The Respondent asserted that Suzanne Averso "would constantly, constantly join into the supervisory visit." Once, she approached the Respondent and inquired if he knew Frank Mitchell. The Respondent answered that he knew Mitchell very well. He explained at trial that he grew up with Mitchell.

After this conversation, the Respondent contended, “[i]t got strange.” The Respondent claimed that he “dreaded” going to the Aversos’ house. Whenever he visited and Richard Averso was not home, Ms. Averso would “bombard” him with questions about Mitchell, like whether he was married or had children, what kind of car he drove, and whether he had his own home.

The Respondent later found out that Ms. Averso called Mitchell’s cell phone about 260 times. After Mitchell asked her to stop calling him, and “called her a psycho and hung up the phone,” she had him arrested for harassment. She alleged in court that she and Mitchell had been in an extramarital relationship. The Respondent testified that Ms. Averso herself was indicted on 161 counts involving computer tampering and filing false police reports. In one of the underlying incidents, the Respondent said, she posed as Mitchell and used his e-mail to ask the Respondent questions about the Aversos. The Respondent eventually realized that the e-mails were not coming from Mitchell.

The Respondent said that his wife had an accident with a red 1995 Jeep Cherokee Sport. She damaged the front headlight, the front plastic bezel around the headlight, and the side blinker. There was also a scratch in the fender. He did not believe that a black grille needed to be replaced, but admitted that in his first interview, he stated that the front grille of the Jeep needed to be repaired. The Respondent asserted that he repaired everything except for the scratch. He did the repairs, which took about an hour, in his driveway in May, June or July of 2005. He got the parts from “all over [REDACTED].” The scratch required “[m]inor paint.”

The Respondent contended that the parts on the Crash & Rust and Accuparts receipts were for a Jeep Cherokee Wagoneer, a different and more expensive model than

the Jeep Cherokee Sport he owned. There was also a model called a Cherokee Comanche. The Wagoneer, the Respondent asserted, had a chrome front; his vehicle had a black front. He did not believe the parts listed in the receipts would fit his Jeep because it was a different model and "different part."

The Respondent asserted that he did not realize until a week later that the fender scratch had been fixed. The Respondent stated that the Jeep was not driven that often. He averred, however, that the Aversos could have seen the damage to the Jeep while he used it at his second job. His second employment was security for the [REDACTED] School District, the district where the Aversos lived. The Felices lived in [REDACTED], about four or five miles away. The Respondent added that he and his wife left the Jeep parked outside the house.

The Respondent testified that after Mitchell was arrested for harassment, the Respondent was speaking to someone and Suzanne Averso's name came up. When Ms. Felice heard the name, she was startled, and revealed the dinner plans to the Respondent. He "had some curse words to say," and told his wife who the Aversos were and that "[u]nder no circumstances do we go out to dinner with them." After the Respondent's second Official Department Interview, Ms. Felice reluctantly told him how the remainder of the Jeep was repaired. She explained that Ms. Averso "posed as the wife of a coworker," knew the Jeep had been in an accident," and offered to have it fixed for the Felices. Ms. Felice said that she paid \$150 for the job. The Respondent testified that neither he nor his wife accepted any gift in exchange for the repairs.

The Respondent asserted that he might have discussed the Jeep accident with the Aversos. He believed he might have seen a "badly banged up" vehicle in the driveway,



and asked where parts for that kind of repair could be obtained. He did not use the Jeep while visiting the Averso home. The Respondent noted that Ms. Averso had a copy of his wife's accident report at her home when she was arrested.

The Respondent stated that the Aversos may have told him to try Crash & Rust for parts. The Respondent believed he might have called that business, but they told him they did not sell to the public.

The Respondent testified that during the investigation of this matter, he attempted to get the receipts for the parts he purchased. When he went to the locations he bought the parts from, they all told him that if the transactions were over a year old, they would be unable to give him the receipts. Bay Shore Chrysler, however, where the Respondent had bought the majority of the parts, "came up with receipts that were in question." These were the receipts Wade testified actually belonged to someone else, Zoob. The Respondent asserted that the parts manager believed those parts belonged to the Respondent.

The Respondent believed he made clear in his Official Department Interview that he "wasn't trying to pass these off as definite." He presented receipts from November 2005, a colder month, because the dealer he approached told him that those were the only parts that fit the Respondent's Jeep. The Respondent insisted at trial that these parts could have been for his Jeep. However, when he obtained the receipts, he "knew at that moment that those were not the correct receipts." He admitted presenting them to his union delegate, to be forwarded to Wade, even though he knew the November 2005 date was "completely out of the window when you claim you fixed your wife's car."

After that date, the Respondent testified that he went on vacation for about two weeks, and when he returned, he was assigned to the Long Island City clinic "to fill in there for a couple of months." It was not until months later, the Respondent asserted, that he learned of the anonymous IAB complaint against Averso.

The Respondent contended that he did not visit ACIU while he was working in the clinic. He also stated that he told Roach of the Schwartz Report posting that mentioned her and her e-mail address. Roach told the Respondent that she had set up the address for the complainant. This, the Respondent asserted, was "when I knew something was going on with the Aversos and the neighbor," although he "didn't even know it was a neighbor."

The Respondent acknowledged stating at one of his Official Department Interviews that he might have inadvertently mentioned something to the Aversos about the complaint, but did not believe he did. He explained this at trial by stating that he "didn't recall if were [sic] to ever say something to them on the phone . . . , but looking back on it, there is absolutely no way because I wouldn't have had that information in the time frame that I talked to" Averso. The Respondent said that he made clear in that interview that he never divulged any information.

The Respondent denied mentioning auction sites like Odessa or Impact to Roach, or telling her to contact DMV to obtain information about the Aversos. He had "no idea" when "[f]or a fact" he found out that an Averso neighbor had made the IAB complaint.

The Respondent admitted that he still had "access" to ACIU in August 2005, in the sense that he possessed a key to the door.

The Respondent asserted that his contacts with the Aversos subsequent to July 26 or 27, 2005, "certainly may have been under a supervisory capacity," noting that he mentioned in his first interview that he had no non-supervisory contacts with them. He contended that the Aversos would call him and ask about things like the orthopedic clinic or "how to file for three-quarters." Some of Ms. Averso's messages were "bizarre," and the Respondent told Averso that Ms. Averso should not be calling the Respondent's cell phone. The Respondent also called Averso to tell Ms. Averso not to try to make dinner reservations with Ms. Felice, as the Respondent and Averso were not co-workers.

At first, on cross-examination, the Respondent denied calling Suzanne Averso in August 2005, but then admitted that he did make a seven-minute call from his personal cell phone to her cell phone on August 11, 2005. The Respondent, however, did not "know who I spoke to." He may have been returning a call, but could not explain why he was on the phone with her for seven minutes. Nor could the Respondent explain why he called the Averso home on May 13, 2005, a date he was on vacation. He again suggested that he might have been returning a message. He did not know why he said during his first Official Department Interview that he never called Richard Averso's cell phone.

The Respondent displayed his cell phone for the Court; it appeared to be the same model as that of Ms. Felice.

The Respondent testified that the Quartermaster Section was not located in the same place as ACIU.

FINDINGS AND ANALYSISSpecification No. 1

The Respondent is charged in the first specification with accepting a gift, namely, discounted repairs to his Jeep, from Police Officer Richard Averso, a member of the service on whom the Respondent paid supervisory visits while Averso was sick.

Neither Richard nor Suzanne Averso testified at trial, and the Department presented their accounts through Lieutenant Wade, who interviewed them and reviewed their previous interviews. The Respondent's counsel objected on hearsay grounds when Wade started to testify about Ms. Averso's statements. The Court asked the Advocate if she was "offering this for the truth of Suzanne Averso's statements or are you offering this just to explain what the original complaint was?" The Advocate answered, "It's just to explain the original complaint." The Court said, "As long as you are doing it to establish what the basis of the witness' investigation is, then that I don't have a problem with." The Respondent's counsel agreed. When Richard Averso's statements were discussed by Wade, the Respondent's counsel asked if "this information is being offered in terms of what the Aversos told this investigator. It's not being offered for the truth in terms of proving the actual charges, but just to give background information." The Advocate agreed "that's what the Department is doing," and the Court stated, "That's what I am accepting it for."

Accordingly, the only evidence available to prove that the Jeep repairs, both structural and paint, were accomplished only through the assistance of the Aversos is the telephone records, car parts receipts, and statements of [REDACTED] Collision personnel. This is not enough to prove the charge.

It was demonstrated at trial that the Respondent became friendly with the Aversos as a result of his visits. Thus, the Respondent's explanation that they kept calling him, even after the supervision technically ended, with all sorts of concerns, was credible.

Furthermore, the Aversos indicated that Richard Averso ordered the parts from both Crash & Rust and Accuparts / Fit-Rite. Thus, the Department's presentation of a phone call from the Respondent to Crash & Rust, with the implication that he was ordering parts for his Jeep on the [REDACTED] Auto Sales account, is not consistent with the Aversos' statements. It is consistent with the Respondent's explanation that he was shopping around for parts that he would put in himself. The phone records, moreover, indicate a call of one minute. This does not seem like enough time to explain in detail the two parts listed on the Crash & Rust receipt, but it is consistent with the Respondent's statement that this business told him they sold only to the trade.

The statement of Tom Sweeney, an employee of [REDACTED] Collision, does not bolster the Department's case very much either. Sweeney recalled that "he did take in a jeep" from Averso in 2005. Both the accounts of the Aversos and that of Ms. Felice, however, would be consistent with this.

Finally, the Department did not present any evidence of what the fair market value of the repairs in question might be. The parts on the receipts come to \$132.93, and that is without a 40% discount given to [REDACTED] Auto Sales by Accuparts. Adding the labor involved, the \$200 Pizza Carnival gift certificate that Ms. Averso said the Respondent gave her in appreciation might be a fair price for the work and thus not a gift at all.

It is worth noting that even if the hearsay testimony in the Aversos' statements was considered for its truth, there was still insufficient corroborative testimony to establish the facts in this specification.

In sum, because the Department did not present sufficient and competent evidence to prove Specification 1, the Respondent is found Not Guilty of that charge.

#### Specification No. 2

Specification 2 charges the Respondent with wrongfully divulging Department information to Police Officer Richard Averso. The information in question was the anonymous complaint made to IAB by [REDACTED], the Aversos' neighbor, that, in essence, Averso was engaging in off-duty employment while on Sick Report.

This specification suffers from similar problems as Specification 1. The hearsay account of Averso, admitted only as background information to assist the Court in understanding the charges, related that the Respondent allegedly told Averso about the neighbor's complaint around the end of July 2005. Even if this was admitted for its truth, it is not very reliable in light of the fact that the complaint did not reach Sergeant Roach of ACIU until August 4, 2005, and the Respondent was on vacation until approximately August 11, 2005. Even then, the Respondent returned to work at the Long Island City clinic, not ACIU, which was located in Lefrak City. [REDACTED] informed Roach on August 14, 2005, that Averso knew a complaint had been made against him to IAB. Based on the evidence, it is unlikely that the Respondent would have discovered the complaint in the outlined time frame, as he did not even work at ACIU during that period. The Court also notes that it would not have been a major leap for Averso to have

suspected a neighbor as the informant because [REDACTED] indicated that Averso was bragging about his misconduct.

Further, Roach testified that the Respondent contacted her in late August or early September 2005, after she was ready to close out [REDACTED]'s complaint for lack of evidence that Averso was "working on vehicles in his driveway." The Respondent informed Roach about Averso's possible use of automobile auction sites, and also stated that he wanted to investigate through DMV how many automobiles were registered to Averso. It is unlikely that the Respondent would have divulged the confidential IAB complaint to Averso but would have then, only weeks later, turned on him by tipping off Roach.

Finally, as with the first specification, the circumstantial evidence presented by the Department does not establish that Averso's hearsay statement to investigators was correct. Beyond the fact that the Department proved only that many calls were made between the Aversos and the Respondent, and that the Respondent tried to minimize the relevance of these calls, the Department also failed to prove that the Respondent became aware of the IAB complaint before Averso did and then told *him* about it. Therefore, the ultimate conclusion that the Respondent informed Averso of the complaint does not "flow naturally," see Caporino v. Travelers Ins. Co., 95 A.D.2d 160, 164 (1st Dept. 1983), rev'd on other grounds, 62 N.Y.2d 234 (1984), from the facts presented. As such, the Respondent is found Not Guilty of Specification 2.

Specification No. 3

The third specification charges the Respondent with failing to notify IAB or his Commanding Officer, Valenti, "having become aware of, or upon receiving an allegation of corruption or serious misconduct" by Averso – specifically, that Averso was engaged in employment while on Sick Report. The Respondent is found guilty of this specification.

Valenti testified that the Respondent did not inform him of Averso's possible involvement with automobile sales before early August 2005, when Valenti became aware of [REDACTED]'s complaint and asked the Respondent about it. Valenti testified that he knew this to be the case because he would have initiated an investigation earlier had the Respondent let him know earlier. The Court finds this to be a credible explanation, and in fact the Respondent conceded that if he had told Valenti that he "saw misconduct," an investigation would have been started. Therefore, the Court finds that the Respondent did not tell Valenti about the suspicious vehicles surrounding the Averso home during the time he was making the supervisory visits. Those visits began in April 2005 and ended around July 27, 2005.

The Court also rejects the Respondent's testimony that he did not actually observe Averso commit misconduct. He testified that he observed, in late July, an unusual amount of vehicles in the Aversos' driveway. Some had dealer license plates, and some had no plates at all. It should have been manifest to a Sergeant, and a member of the service for nearly two decades, not just that "something might have been going on," but that Averso may have been working while on Sick Report.



The Respondent's next excuse was that he did not know if Richard or Suzanne Averso was doing the work. He noted that Richard Averso was too injured to work. The Respondent also stated, however, that he warned Averso of the Department's rules against working while on Sick Report. If the Respondent was suspicious enough of the possibility of such serious misconduct by Averso, he had the responsibility to inform immediately either Valenti or IAB. It is incumbent on members of the service to be alert and vigilant. The presence of vehicles without license plates, or with dealer plates, should have alerted the Respondent to the possibility that even if Averso was not engaged in the physical endeavor of repairing automobiles, he might well have been involved in the passive activity of buying and selling them.

In this situation, the fact that the Respondent had enough suspicion of Averso's misconduct to warn him against doing so means that he had enough suspicion that the Patrol Guide mandated him immediately to inform either his Commanding Officer or IAB of the possible misconduct. As such, the Respondent is found Guilty of Specification 3.

#### Specification 4

The fourth specification charges the Respondent with falsely stating at his first Official Department Interview that he did not exchange phone numbers with Richard Averso. The Court finds him Guilty.

In his first interview, the Respondent was asked about Suzanne Averso's calls to his home in an attempt to make dinner plans. When asked how Ms. Averso got his home phone number, the Respondent professed that he had "no idea." The Respondent

indicated that he would have already been in possession of Aversos' home number because the Respondent was supervising him.

The Court rejects the Respondent's explanation that he simply forgot giving his business card, with his home landline and personal cell phone numbers handwritten on the back, to Averso. His testimony portrayed his visits to the Averso home as very memorable. He described their house as "crazy" and "a mess." Ms. Averso constantly interfered with the visits. The Respondent particularly remembered that she was unusually interested in their mutual friend, Frank Mitchell. The Respondent also recalled that he gave the business card to the Aversos because they mentioned having a sick child whose hospital visits might make them unable to reach the Sick Desk. The Respondent also recalled that both Aversos called him often, even after the Respondent's supervision of Averso had ended, with all manner of concerns. It is unlikely that the Respondent, having remembered so much about the Averso visits, would have forgotten that he gave them his personal home and cell numbers.

The Court also discredits the Respondent's explanation that all the members he supervised had his numbers so they would know it was him if they were screening their calls or using Caller ID. This claim only begs the question of why the Respondent was unsure in his first interview how Ms. Averso got his home number; if all of his supervisees had his numbers, the Respondent should have been able to offer that as an answer. If, on the other hand, the Respondent meant that he generally gave out only his work-related telephone numbers to the members he supervised, the act of giving the Aversos his home and personal cell numbers should have been only more unique and memorable.

The Court notes that although the Respondent downplayed his conversations about non-work topics during the Averso visits as "minor," the evidence demonstrates otherwise. The handwritten home and personal cell numbers on the back of the Respondent's business card do not contain area codes. This indicates that the Respondent and Averso spoke in a manner sufficiently detailed and cordial for the Respondent to mention that he too lived in [REDACTED], and for Averso to remember this, so that he would not have to use an area code if he dialed the Respondent. It again begs the question of how the Respondent could have forgotten giving out this information, as he and Averso obviously became friendly enough during one of the visits for the Respondent to give out his home landline and personal cell phone numbers to a member of the Department he was charged with supervising.

#### PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222, 240 (1974). The Respondent was appointed to the Department on April 2, 1995, as a merged member previously employed by the New York City Transit Police Department, to which he was appointed on January 30, 1988. Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

The Respondent has been found Guilty of failing to report Averso's serious misconduct to either Valenti or IAB. He has also been found Guilty of falsely stating during an Official Department Interview that he did not give his home phone number to

the Aversos. On summation, the Department argued for a penalty of 60 vacation days and one year of dismissal probation.

A substantial penalty is warranted for both of these forms of misconduct. As noted supra, the Respondent became friendly with both Aversos during the period of supervision. The Respondent mentioned that he was also a resident of [REDACTED]. It was revealed during their conversations that Frank Mitchell was an acquaintance common to both the Respondent and Suzanne Averso. The Respondent stated that the Aversos helped him in his search for Jeep parts. It is reasonable to conclude from the evidence that the Respondent held back on reporting what he suspected to be misconduct by Richard Averso because he did not want to cause problems for people that had become his friends. *See Disciplinary Case No. 77859/02* (Respondent forfeited 45 vacation days for failing to request medical assistance for argumentative civilian who was injured by Respondent's partner; Respondent and partner then left the scene, and Respondent failed to notify IAB or commanding officer of partner's misconduct); *Disciplinary Case No. 74677/99* (Respondent forfeited 30 suspension days already served for neglecting to inform Department that his brother had access to vehicle that had been involved in hit-and-run accident; Respondent knew the Department was investigating the accident, but withheld the information because he wanted to protect his brother and avoid becoming witness against brother in criminal case).

The Respondent's false statement in his first interview taken pursuant to *Patrol Guide* § 206-13 is equally serious. It is reasonable to conclude from the evidence that the Respondent gave this false statement because he did not want to admit that he gave out his home and personal cell phone numbers to a member of the Department he was

charged with supervising. This kind of deceit is not acceptable. See Disciplinary Case 79410/03 (16-year member with no prior disciplinary record forfeited 45 vacation days, all suspension days already served, and was placed on one-year dismissal probation for running for personal business a vehicle license plate number on Department computer, revealing identity of registered owner of the vehicle to a civilian, and interfering with an official Department investigation into the incident by not providing truthful answers in his official interview); *Disciplinary Case No. 77182/01* (30 vacation days and one year dismissal probation for 11-year officer with no prior disciplinary record who pleaded Guilty to impeding an investigation; Respondent gave imprecise answers to an investigator in hopes of distancing himself from the incident under investigation, claiming not to recall clearly where he was in relation to the other participants in the incident; Respondent also failed to recall meeting with the participants and discussing the incident the next day).

In light of the otherwise very favorable record of the Respondent, the Court recommends that the Respondent be DISMISSED from the New York City Police Department, but that his dismissal be held in abeyance for a period of one year, pursuant

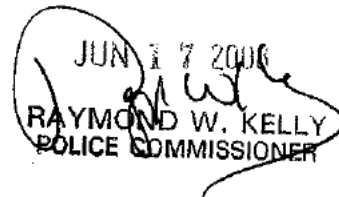
to Section 14-115 (d) of the Administrative Code of the City of New York, during which time he is to remain on the force at the Police Commissioner's discretion and may be terminated at any time without further proceedings. The Court further recommends that the Respondent forfeit 30 vacation days.

Respectfully submitted,



David S. Weisel  
Assistant Deputy Commissioner – Trials

**APPROVED**



JUN 17 2006  
RAYMOND W. KELLY  
POLICE COMMISSIONER